

07-1300
AUDIT
TAX YEAR: 2003
SIGNED 12-10-2008
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON
DISSENT: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioners, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION Appeal No. 07-1300 Account No. ##### Tax Type: Income Tax Tax Years: 2003 Judge: Phan
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Presiding:

Marc Johnson, Commissioner
D'Arcy Dixon Pignanelli, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission pursuant to Utah Code Sec. 59-1-501 and 63-46b-1 et al., for a Formal Hearing, on August 13, 2008. Based upon the evidence and testimony presented at the hearing the Tax Commission hereby makes its:

FINDINGS OF FACT

1. This matter is before the Commission on Petitioner's appeal of income tax, penalty and interest deficiencies issued against him for tax year 2003. The Statutory Notice of Estimated Income Tax had been issued on October 2, 2007.

2. The amount of the deficiency at issue is as follows:

Year	Tax	Penalty	Interest	Total ¹
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. The penalties assessed with the audit were a 10% failure to file penalty and a 10% failure to pay penalty assessed pursuant to Utah Code Sec. 59-1-401.

4. Petitioner did not file a Utah Individual Income Tax Return for the 2003 tax year as it was his position that he was not a Utah resident individual for tax purposes. The Division issued the audit on the basis that Petitioner had maintained his domicile in Utah throughout the tax year, and, therefore, met the criteria of a Utah resident individual.

5. Prior to 1997 Petitioner, along with his family, resided out of state. They resided wherever Petitioner found employment. For instance, upon graduating from a law school in Utah, Petitioner moved to STATE 1 in 1986. From 1986 through 1993 he worked for three different law firms as an “at will” employee. In 1993 he accepted “at-will” employment in STATE 2. He and his family moved to STATE 2.

6. In 1997 Petitioner obtained employment in Utah at COMPANY A. He and his family moved to Utah.

7. Petitioner testified that with each move for new employment opportunities he changed his domicile, cutting his ties with the old domicile and establishing a new domicile in the new location.

8. In 1997, after moving to Utah and renting a residence in CITY 1, Petitioner and his wife began having their ‘dream home’ constructed in CITY 2, Utah. It took one year for the construction and they had designed the residence themselves, specific to their needs and tastes. In November 1999 Petitioner accepted a new position with COMPANY B, in CITY 3, Utah. He continued to work there until he was informed in late 2001 that his position was being eliminated due to reduction in force. He did have an employment contract

1 Interest calculated to the date of the Statutory Notices. Interest continues to accrue on any unpaid balance.

that provided him compensation for a period of six months, during which he continued to work for COMPANY B and search for a new job.

9. Petitioner did not limit his job search to Utah, or even the United States. When he was able to find employment in 2002, the job was at COMPANY C located in CITY 1, COUNTRY.

10. He accepted the job offer in COUNTRY. He signed an employment contract with a three-year commitment, although they had verbally talked about a 5-year commitment. The employment contract provided that the employer pay Petitioner's expenses to move to CITY 1 along with an allowance to furnish an apartment. There were other benefits including that the employer paid 90% of Petitioner's rent, rented a vehicle for Petitioner, paid tuition for his children to attend school, paid for the family to fly to the U.S. for a once a year leave, and paid COMPANY D to prepare his Petitioner's tax filings. Further once the employment was terminated the contract provided that the employer would pay to repatriate Petitioner and his family back to the U.S. The apartment lease was in the employer's name, not Petitioner's. The car lease was also to the employer.

11. Petitioner testified that this move to CITY 1, with at least a three year commitment by contract and a longer verbal commitment, was more permanent to him than the "at will" employment positions he had previously accepted in the United States and for which he had moved himself and family from state to state.

12. Petitioner and his spouse listed their "dream home" in Utah for sale in July 2002. It was during a time when the housing market was poor and they ended up losing money on the sale when it finally sold in April 2003. Petitioner testified that if they had thought they would return to Utah they would have kept the house. He states they sold the house for \$\$\$\$ less than they had put into it. He indicates that he could have continued making the mortgage payments for four years for less than that. After they moved to CITY 1, they no longer had a telephone in Utah or a mailing address.

13. In August 2002, Petitioner, his wife and his younger children moved to CITY 1. They shipped all their personal possessions to CITY 1 that they intended to keep. Their Utah residence had been 5,400

square feet. Rather than save or store the furnishings from this residence that would not fit in the much smaller CITY 1 apartment, they sold the remainder of their possessions, with the exception of a motor vehicle, which they left in Utah for their son to drive who remained in this state. The Division pointed out that they had sold their televisions and electronic devices rather than ship them. Then they purchased new ones in CITY 1 using the furnishing allowance from Petitioner's employer.

14. Petitioner's employer rented for Petitioner a 2,000 square foot apartment in CITY 1. Petitioner indicates that to buy this type of apartment would have cost around \$\$\$\$ U.S. dollars. They simply could not afford to buy an apartment of this size. They enrolled their children in school in CITY 1 and settled in. Petitioner testified that he would never have done all of this if he thought it would only last a couple of years.

15. Petitioner did retain a bank account at BANK, but it was the same account that he had since law school and had kept it during prior moves.

16. Petitioner obtained a one-year work visa and began working in CITY 1. The visa was renewable annually. Petitioner did not obtain a drivers' license in CITY 1, because he could drive using his Utah license. He testified that obtaining a CITY 1 driver's license was difficult, requiring time for training and testing. He testified that it was so difficult to obtain a driver's license in CITY 1 that having one would be something that CITY 1ians would state on their resumes.

17. In August 2003, for their annual vacation, Petitioner and his family visited Utah for a couple of weeks. Their older children were in Utah and extended family.

18. Petitioner and his family attended a church congregation in CITY 1.

19. Petitioner paid COUNTRY income taxes and paid into the COUNTRY social security system.

20. After getting himself and family settled in CITY 1, Petitioner's employment situation became increasingly difficult and was not as anticipated. He states that he was the only American at the 400-employee firm. Petitioner represented that the firm was owned by four COUNTRY 2 brothers and employed primarily

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people of (X) decent. Shortly after he started employment, the United States entered into the (X) war, which Petitioner indicated was extremely unpopular with his co-workers. He states he was not given the responsibilities that had been represented to him and it was obvious that things were not working out.

21. In September 2003 he indicates that he reached a mutual agreement with the employer to end his employment effective December 2003.

22. He began to search for new employment. He states that he did search extensively in CITY 1 because they really wanted to stay there, but nothing worked out. Without employment in CITY 1 they were unable to remain there. He also looked for employment in other areas of CONTINENT and the United States. He accepted a position in COU NTRY 4 as the family packed up their belongings and prepared to move from the CITY 1 apartment provided by the employer. But later Petitioner determined there were too many financial risks and he changed his mind. His mother was in the last stages of cancer at that time. In December 2003 they flew to Utah to spend their holidays with their extended family. Because Petitioner did not know where he would be living, he told the shipping company to send their furniture and other possessions to the United States, and when the possessions reached STATE 2, Petitioner would let the shipping company know where to send them. Ultimately he had their furniture and other possessions shipped to Utah, so Petitioner could spend time with his mother while looking for new employment.

23. Upon review of all the facts and testimony in this matter it is the Commission's conclusion that Petitioner did take actions consistent with having a specific intent to abandon the Utah domicile. Petitioner and his spouse listed their Utah residence for sale during a poor housing market. This was the residence they had specifically designed and built as their "dream home." Had they intended to return to Utah, they would likely have kept the house as they lost more on the sale than if they had kept the property and made the mortgage payments. Additionally, Petitioners shipped to CITY 1 or sold all of their personal belongings. This is consistent with intent to abandon a Utah domicile.

24. Petitioner also established an actual physical presence in CITY 1 prior to the tax year at issue. There is no dispute on this point. Petitioner had moved there with his family where they resided throughout the year at issue. His job was there. He worked full time in CITY 1 while his children attended school there.

25. However, before a new domicile is shown for tax purposes Petitioner must show not only the specific intent to abandon the Utah domicile and a physical presence in a new domicile; Petitioner must also show the intent to remain in the new domicile permanently. Like Petitioner's prior moves between states, Petitioner would find a new job, Petitioner and his family would pack up and move their belongings, sell their residence and find a new residence in the new state. They would sometimes rent in the new place first before purchasing a home that they owned. In fact when they moved to Utah in 1997 they rented a place first, then had a home constructed to suit their needs. There are really only two differences with the Petitioner's move to CITY 1, from his prior moves. One, he did not obtain a new drivers license like when he moved between states in the U.S. The Commission would take administrative notice, however, of the fact that generally states have a legal requirement to obtain a drivers license within a certain time of moving into the state. Petitioner testifies that he could drive legally in CITY 1 after moving there, using his Utah license. The second factor is the situation of having only a temporary Visa to work in COUNTRY. While within the United States he could move and work anywhere for any time.

26. In weighing the evidence, the Commission concludes that Petitioner's move to CITY 1 was, in fact, like his previous moves between states for a permanent, or at least an "indefinite time." Petitioner had the same intent when moving to CITY 1 as he had when he previously moved to STATE 1., then STATE 2, and then Utah. He took most of the same steps in the move to CITY 1 as he had in his prior moves, except where the laws were different regarding driver's licenses and Visas. The Commission concludes from Petitioner's testimony at the hearing and the corroborating factors presented at the hearing that he intended to remain in COUNTRY indefinitely.

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104 (2002)² as follows:

...a tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual...

"Resident individual" is defined in Utah Code Sec. 59-10-103(1)(k) (2002) as:

(i) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of such period; or (ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state. For purposes of this Subsection (1)(k)(ii), a fraction of a calendar day shall be counted as a whole day.

For purposes of determining whether an individual is domiciled in this state the Tax Commission defined 'domicile' at Utah Administrative Rule R865-9I-2:

A. Domicile

1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.

2. For the purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.

a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.

b) Domicile applies equally to a permanent home within and without the United States.

² Both the Utah Individual Income Tax Act and the Administrative Rule defining domicile have been revised to some extent and some sections renumbered subsequent to the audit period. The Tax Commission applies and cites to the statutes and rule that were in effect during the audit period.

3. A domicile, once established, is not lost until there is a concurrence of the following three elements:

- a) A specific intent to abandon the former domicile;
- b) The actual physical presence in a new domicile; and
- c) The intent to remain in the new domicile permanently.

4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.

B. Permanent place of abode does not include a dwelling place maintained only during a temporary stay for the accomplishment of a particular purpose. For purposes of this provision, temporary may mean years.

The applicable law places the burden of proof on the taxpayer. Utah Code Sec. 59-10-543 provides the following:

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner. . .

Penalties for failure to file and failure to pay taxes are set out at Utah Code Sec. 59-1-401(1) & (2), which provide:

The penalty for failure to file a tax return within the time prescribed by law including extensions is the greater of \$20 or 10% of the unpaid tax due on the return. (b) This Subsection (1) does not apply to amended returns. Utah Code Sec. 59-1-401(1).

The penalty for failure to pay tax due shall be the greater of \$20 or 10% of the unpaid tax for (a) failure to pay any tax, as reported on a timely filed return; (b) failure to pay any tax within 90 days of the due date of the return, if there was a late filed return subject to the penalty provided under Subsection (1)(a). Utah Code Sec. 59-1-401(2).

The Commission has been granted the discretion to waive penalties and interest. Section 59-1-401(11) of the Utah Code provides, "Upon making a record of its actions, and upon reasonable cause shown, the

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commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.” Utah Code Ann. §59-1-401(11).

ANALYSIS

Utah Code Sec. 59-10-104 imposes a tax on every "resident individual." "Resident individual" is defined at Utah Code Sec. 59-10-103(1)(k) which states, ""Resident individual" means: (i) an individual who is domiciled in this state for any period of time during the taxable year, . . . or (ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state." It was unrefuted that Petitioner did not spend 183 days or more in this state. The issue before the Commission is the alternative basis for residency, whether Petitioner remained "domiciled" in Utah during the audit period.

Also clear from the facts in this matter, Petitioner had been domiciled in Utah for a period of time prior to the audit period, from 1997 through July of 2002. Therefore, in considering the law and the applicable rule, the Tax Commission begins its analysis with the position that Petitioner had established domicile in Utah. "Domicile" is defined by Utah Admin. Rule R865-9I-2 and the rule provides that once a domicile has been established, three elements must be shown before a new domicile is indicated: a) a specific intent to abandon the former domicile; b) the actual physical presence in a new domicile; and c) the intent to remain in the new domicile permanently.

The question of whether one maintains a domicile or has abandoned and established a new domicile out of the state is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a "resident individual" for state tax purposes has been addressed by the courts in Utah.³

³ The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals in the following cases: Lassche v. State Tax Comm'n, 866 P.2d 618 (Utah Ct. App. 1993); Clements v. State Tax Comm'n, 839 P.2d 1078 (Utah Ct. App. 1995), O'Rourke v. State Tax Comm'n, 830 P.2d 230 (Utah 1992), and Orton v. State Tax Comm'n, 864 P.2d 904 (Utah Ct. App. 1993).

As discussed by the courts in considering this issue, the fact finder may accord the party's activities greater weight than his or her declaration of intent.⁴ Additionally Petitioner has the burden of proof to establish that the audit is incorrect.

Therefore, the Commission must consider whether the facts support Petitioner's contention that he was no longer domiciled in Utah during 2003. From the facts, especially those surrounding the sale of their Utah residence and any personal belongings that they were unable to take with them, it is clear that Petitioner and his family intended to abandon their Utah domicile. Furthermore, it is also clear that they had an actual physical presence in CITY 1.

The more difficult issue is whether Petitioner intended CITY 1 to be his permanent home. Utah Admin. Rule R865-9I-2(A)(1) provides that domicile is the "place at which an individual has voluntarily fixed his habitation, not for a special or temporary purposes, but with the present intention of making a permanent home." The Commission would note that the case law in Utah indicates that 'permanent home' is one where there is an intent to remain for an indefinite period, not necessarily an intent to remain for all time. In *Clements v. Utah State Tax Comm'n*, 893 P.2d 1078, (UT Ct. App. 1995), a case involving domicile for Utah individual income tax purposes, the Utah Court of Appeals cited, as precedent, the language in *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613 (Utah 1978). The Utah Supreme Court in *Allen*, at 615, stated, "A man's home is where he makes it, not where he would like to have it. Even though a person may not intend to remain in the state for all time, domicile will be found where there is a residence coupled with an intent to remain for an indefinite period."⁵ Likewise in *O'Rourke v. State Tax Comm'n*, 830 P.2d 230 (Utah 1992), the Utah Supreme Court noted an intent to remain in Utah for an "indefinite time" as reason for determining the appellants domicile for income tax purposes.

⁴ See *Clements v. Utah State Tax Comm'n* 893 P.2d 1078 (Ct. App. 1995); and *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613, 614 (Utah 1978);

⁵ This issue of "permanent" residency has been addressed in other jurisdictions. See *McKone v. State Tax*

In weighing the evidence, the Commission concludes that Petitioner's move to CITY 1 was, in fact, like his previous moves between states for an "indefinite time." Petitioner had the same intent when moving to CITY 1 as he had when he previously moved to STATE 1., then STATE 2, and then Utah. He took most of the same steps in the move to CITY 1 as he had in his prior moves, except where the laws were different regarding driver's licenses and Visas.

CONCLUSIONS OF LAW

1. The Commission has made a finding of fact that Petitioner did intent to abandon his Utah domicile, had a physical presence in CITY 1 intended to remain in CITY 1 indefinitely. Based on these factual conclusions the Commission finds that Petitioner was not domiciled in Utah during 2003, and, therefore, was no longer a "resident individual" as defined at Utah Code Sec. 59-10-103.

2. As Petitioner was not a "resident individual" during the 2003 tax year, he is not subject as a resident individual to Utah individual income tax pursuant to Utah Code Sec. 59-10-104.

3. The failure to file and failure to pay penalties are calculated based on the amount of Utah individual income tax assessed pursuant to Utah Code Sec. 59-1-401. As Petitioner was not required to file or pay tax on his non-Utah source income the penalties are not warranted.

DECISION AND ORDER

Based on the foregoing, the Tax Commission abates the audit deficiency of tax, penalties and interest issued against Petitioner as it pertains to his Utah individual income tax for the 2003 tax year. It is so ordered.

DATED this ____ day of _____, 2008.

Jane Phan
Administrative Law Judge

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BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision. As two Commissioners have found for the taxpayer in this matter and two against, resulting in a tie vote, the taxpayer is considered to have prevailed pursuant to Utah Code Sec. 59-1- 205 and the audit is to be abated.

DATED this ____ day of _____, 2008.

Pam Hendrickson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

DISSENT

We respectfully disagree with our colleagues' conclusion in this matter. Although we do agree that Petitioner had intended to, and in fact did, abandon his domicile in Utah, we do not find that Petitioner had shown that he intended to remain in COUNTRY permanently, or even indefinitely. Before presenting our particular reasoning, however, we will address the fundamental finding and conclusion by the majority. The final paragraph of the Analysis, states in summary, that Petitioner "had the same intent" in his move to CITY 1 that he had demonstrated in his prior moves to other locations where he had been domiciled. To begin, we are uncomfortable in basing a decision on the similarity of other actions as a general principle. While Petitioner's prior behavior may be an indicator of his intent, at best it is only marginally dispositive of intent and certainly does nothing to establish domicile, as the majority indicates.

Furthermore, we find that Petitioner's actions with respect to two critical factors involved with his move to CITY 1 are not only distinguishable from his previous changes of domicile, but, more importantly, demonstrate that he did not establish domicile in CITY 1.

First, there is the fact that Petitioner did not obtain a driver's license in CITY 1. A driver's license, in spite of the excuses, would have helped to corroborate that he did, in fact, intend to remain in CITY 1 on a

permanent basis. Under Utah Law, we understand Petitioner would have been precluded from renewing his Utah license if he was no longer a Utah resident. *See* Utah Code Sec. 53-3-204(1)(a)(iv.).

Additionally, and more critically, we note that he had entered into an employment contract for a period specified to be three-years. The contract specifies:

16. END OF ASSIGNMENT AND TERMINATION

This assignment is for three years. Upon completion of the assignment, you will be repatriated to STATE 2 (United States).

That clause continues to provide moving expenses from his “foreign assignment” location to his “designated home location city.” In contrast to Petitioner’s prior employment situations, which were clearly indefinite, this assignment was for a specified and clearly temporary purpose. Rule R865-9I-2 B. provides that a “[p]ermanent place of abode does not include a dwelling place maintained only during a temporary stay for the accomplishment of a particular purpose. For purposes of this provision, temporary may mean years.” Petitioner’s employment contract is consistent with this provision of the rule.

Although Petitioner had testified that he and the employer discussed a five-year commitment, the actual contract limits this employment to a three-year period and there were no provisions to extend the contract for an additional period. Mere discussions are not sufficient to undo the terms of a contract and establish domicile.

Marc B. Johnson
Commissioner

R. Bruce Johnson
Commissioner

Notice: Failure to pay within thirty days the balance that results from this order may result in additional penalties and interest. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Sec. 63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. & 63G-4-401 et seq.